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In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD M. BEASLEY AND SIDNEY K. BRADLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' indictment improperly joined counts and defendants.

2. Whether petitioners' indictment was duplicitous because it charged one conspiracy with two illegal objects.

3. Whether a defendant who is convicted by a general verdict on one count of conspiring to distribute cocaine and marijuana, in violation of 21 U.S.C. 841(a), may be sentenced to the more severe penalty authorized where the object of the conspiracy is distribution of cocaine or of more than 1000 pounds of marijuana, rather than only the lesser penalty for conspiracy to distribute less than 1000 pounds of marijuana (petitioner Beasley only).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A59) is reported at 736 F.2d 571.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1984. A petition for rehearing was denied on July 11, 1984. The petition for a writ of certiorari was filed on September 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioners were convicted of conspiracy to possess and distribute marijuana and cocaine, in violation of 21 U.S.C. 846. Petitioner Beasley was sentenced to 13 years' imprisonment and fined

$20,000. Petitioner Bradley was sentenced to four years' imprisonment and fined $10,000.

The evidence at trial established that petitioners and several associates operated a substantial and geographically far-flung marijuana trafficking enterprise (Pet. App. A2-A9). The government also established that, on at least one occasion, petitioner Beasley provided cocaine for his co-conspirators (*id.* at A3), and that the conspirators regularly trafficked in cocaine (*id.* at A7-A9).

Petitioners and their associates were charged with one count of conspiring to possess and distribute marijuana and cocaine. In addition, one of petitioners' co-defendants, Marvin Hall, was charged in a second count of the indictment with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. This charge cited as a predicate criminal act (see 21 U.S.C. 848(b)(1)) the drug conspiracy in which petitioners had participated. Over the defendants' objections, the district court ordered a single trial on both counts, and declined to order separate trials for the various defendants. All of the defendants were convicted.

The court of appeals affirmed petitioners' convictions and declined to disturb their sentences. The court rejected petitioners' contention that the evidence failed to establish the existence of a single conspiracy with the aim of distributing both marijuana and cocaine, noting that "[t]here was sufficient evidence to show that the conspiracy was comprised of a common goal between all participants, i.e., to *possess and distribute drugs (marijuana and cocaine) for profit.*" Pet. App. A12 (emphasis in original). The Tenth Circuit also concluded that the district court properly joined all of the defendants in a single conspiracy trial and did not err in failing to grant petitioners a severance, because "the evidence established one conspiracy and * * * each [defendant] was sufficiently connected to the

conspiracy" (*id.* at A27). Similarly, the court of appeals upheld the joinder of the conspiracy and continuing criminal enterprise counts, explaining that they involved related evidence and that the introduction of proof relating to the latter count did not lead to the " 'spillover' of prejudicial evidence" onto petitioners (*id.* at A32). Finally, the court held that petitioner Beasley properly was sentenced pursuant to the statutory provisions (21 U.S.C. 841(b)(1)(A) and (6)) directed at trafficking in cocaine or in more than 1000 pounds of marijuana, both because he dealt in cocaine and because his attorney conceded at sentencing that he was "connected to" at least 1260 pounds of marijuana (Pet. App. A49).

ARGUMENT

In this Court, petitioners repeat the arguments rejected by the Tenth Circuit. All are without merit.

1. Petitioners are incorrect in alleging that the defendants improperly were joined in one indictment. Fed. R. Crim. P. 8(b) provides that "[t]wo or more defendants may be charged in the same indictment * * * if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Here, of course, that is precisely what the conspiracy count alleged.[1] For similar reasons, joinder of the two counts of the indictment was proper: because the continuing criminal enterprise count cited the conspiracy charged in the first count of the indictment as a predicate offense, "the offenses charged" plainly were "of * * * similar character or * * * based on the same act or transaction or on

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[1]That co-defendant Hall was charged with engaging in a continuing criminal enterprise as well as with conspiracy did not make it improper for him to be joined with the other defendants in one indictment: "defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." Fed. R. Crim. P. 8(b).

two or more acts or transactions connected together or continuing parts of a common scheme or plan." Fed. R. Crim. P. 8(a).[2] Finally, on the record below the court of appeals correctly found that the joinder of offenses and defendants did not prejudice petitioners' rights, so that the district court properly exercised its discretion in declining to grant a severance under Fed. R. Crim. P. 14. See Pet. App. A29, A32-A33. This factual issue does not warrant further review.

2. Petitioners' argument is similarly flawed in suggesting that the first count of the indictment was duplicitous because it charged two conspiracies, one involving marijuana and the other involving cocaine. In fact, the indictment alleged only one conspiracy, which had the aim of distributing two types of drugs. This did not render the indictment defective. To the contrary, "[t]he allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime and that is one, however diverse its objects.' " *Braverman* v. *United States*, 317 U.S. 49, 54 (1942), quoting *Frohwerk* v. *United States*, 249 U.S. 204, 210 (1919). And the court of appeals found that "there exists sufficient evidence 'linking' the transactions in each drug to result in one conspiracy" (Pet. App. A13).[3]

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[2]Petitioners assert that the indictment improperly "joined" allegations of two separate conspiracies in the first count of the indictment (Pet. 7). In fact, however, the indictment plainly charged a *single* conspiracy with several criminal objectives. Count one therefore raises no issues under Fed. R. Crim. P. 8(a), which is addressed to indictments involving "[t]wo or more offenses." As is noted below, the indictment also does not present duplicity or variance problems.

[3]Because a single conspiracy was alleged and proved (see Pet. App. A10-A13) — and because this conspiracy involved all of the defendants (see *id.* at A12-A13) — there was no variance between the allegations of Count One of the indictment and the proof adduced at trial.

3. Petitioner Beasley also challenges his sentence. He bases his argument on the penalty provisions of 21 U.S.C. 841, which set forth the sanctions for violations of 21 U.S.C. 846. Section 841(b)(1)(A) sets the maximum sentence for a conviction involving cocaine at 15 years' imprisonment and a $25,000 fine. Section 841(b)(6) prescribes a maximum sentence of 15 years' imprisonment and a $125,000 fine for crimes involving more than 1000 pounds of marijuana. But Section 841(b)(1)(B) sets a maximum sentence of only five years' imprisonment and a fine of $15,000 for trafficking in less than 1000 pounds of marijuana.[4] Because the jury here returned a general verdict, Beasley — who was sentenced to 13 years' imprisonment and fined $20,000 — asserts that it may have believed him to be guilty only of conspiring to distribute less than 1000 pounds of marijuana. Hypothesizing this possibility, he contends that the district court could not lawfully have imposed a sentence in excess of that authorized by Section 841(b)(1)(B) for offenses involving less than 1000 pounds of marijuana.

This argument misapprehends the nature of 21 U.S.C. 841. The elements of an offense under the statute are described in Section 841(a), which is captioned "[u]nlawful acts"; in relevant part, that provision makes it a crime simply "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 841(b), which is captioned "[p]enalties," then provides that "any person who violates [Section 841(a)] shall be sentenced as follows * * * ." It proceeds to set forth the sanctions to be applied by the district court when an offense of the type described in Section 841(a) has been established. Section 841(b)(6), for example, states that "[i]n the case of a violation of [Section

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[4]Each of these provisions also provides that the maximum permissible sentence may be doubled when the defendant previously has been convicted of a drug-related felony.

841(a)] involving a quantity of marihuana exceeding 1,000 pounds," the defendant may be sentenced to 15 years' incarceration and fined $125,000. Immediately afterwards, it provides that persons previously convicted of drug-related offenses may have their sentences doubled. The other Subsections of Section 841(b), which set forth the penalties that may be imposed for trafficking in various types of controlled substances, are phrased similarly.

This statutory language and structure suggests that neither the type nor the quantity of the controlled substance handled by the defendant is an element of a Section 841 offense that must be found by the jury. Instead, those factors are to be taken into account only by the trial judge when he passes sentence.[5] Thus, so far as Section 841(b)(6) is concerned, "the crime can be proved without any consideration of the amount involved, but then if the proof shows more than 1,000 pounds [of marijuana] was 'involv[ed]' the limit on the maximum sentence is 15 instead of five years." *United States* v. *Simmons*, 725 F.2d 641, 643-644 (11th Cir. 1984), cert. denied, No. 83-1942 (Oct. 1, 1984). In other words, the statute was written by Congress to make "[t]he 1,000 pound provision * * * applicable only to the sentencing phase." *Id.* at 644. Indeed, any other conclusion would lead to anomalous results: if all of the criteria listed in Section 841(b) must be viewed as elements of the offense, the prosecution could obtain the double enhanced penalty described in Section 841(b)(6) only by proving to the jury

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[5]There is no doubt that a district judge may consider both material that was not presented to the jury and evidence that was introduced at trial in setting sentence. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 (1973). It is equally plain that Congress may direct the sentencing authority to take account of factors that are not considered by the jury. Cf. 18 U.S.C. 3577.

that the defendant previously had been convicted of a drug-related felony — evidence that often would be inadmissible under Fed. R. Evid. 403 or 404(b).[6]

The legislative history of Section 841(b) confirms the congressional intent to have the provision apply only in the sentencing phase of criminal proceedings. For example, Section 841(b)(6) was enacted in 1980, 10 years after the rest of the Controlled Substances Act (codified in scattered sections of 21 U.S.C.), "to increase criminal penalties for trafficking in over 1,000 pounds of marihuana" by "distinguish[ing] — *for purposes of criminal sanctions* — between large and small trafficking violations." S. Rep. 96-916, 96th Cong., 2d Sess. 2, 14 (1980) (emphasis added). Congress thus intended to modify the existing "drug penalty structure" by giving law enforcement personnel "the capability to recommend imposition of prison sentences sufficient to disrupt major trafficking operations." *Id.* at 14. See *id.* at 20; H.R. Rep. 96-936, 96th Cong., 2d Sess. 13 (1980). Nothing in this history suggests that Congress intended to create a separate offense involving large-scale trafficking. To the contrary, it appears that Section 841(b)(6) was designed simply to rectify Congress's original failure to authorize the imposition of substantial penalties for significant marijuana-related violations of Section 841(a). See 126 Cong. Rec. 11791 (1980) (remarks of Rep. Carter) ("we did

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[6]The same reasoning applies to the other Subsections of Section 841(b), which also describe criteria that plainly were not intended to be found by the jury. Section 841(b)(4), for example, prescribes favorable sentencing treatment for persons who "violate[] [Section 841(a)] by distributing a small amount of marijuana for no remuneration." The determination whether a "small amount" of the drug was involved is a matter that undoubtedly is committed to the sentencing judge's discretion. Similarly, the other Subsections of Section 841(b) all provide for enhanced penalties for defendants who previously have been convicted of drug-related offenses.

not make the penalties for marijuana as strict as they should have been").[7]

Here, the jury plainly found that Beasley had committed the offense stated in Section 841(a). And — even apart from Beasley's participation in the cocaine trafficking aspect of the conspiracy — the district court should have had little trouble concluding that an enhanced sentence was appropriate under Section 841(b)(6): Beasley's attorney conceded at his sentencing hearing that Beasley was "connected to at least 1,260 pounds of marijuana" (Pet. App. A49). Because there is no conflict among the circuits on the application of Section 841 to these circumstances, review of the sentencing issue presented by Beasley is not warranted.[8]

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[7]The legislative history underlying the other Subsections of Section 841(b) similarly points up the congressional intent to apply those provisions only in sentencing. Congress made it plain that the Section 841 offense was defined simply as the sale of any controlled substance; only the "penalties for * * * violations * * * of the bill" were to depend upon the circumstances of the offense. H.R. Rep. 91-1444, 91st Cong., 2d Sess. Pt. 1, at 10 (1970). Thus, after outlining the provisions of what became Section 841(b), the House Report explained that "[t]he foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." H.R. Rep. 91-1444, *supra*, at 11.

[8]The Eleventh Circuit has addressed the nature of Section 841 in three recent decisions. In *Simmons*, as is noted above, the court of appeals stated that the factors set out in Section 841(b)(6) are relevant only to sentencing proceedings. In *United States* v. *Alvarez*, 735 F.2d 461 (11th Cir. 1984), the court held that, when an indictment charges conspiracy to distribute both cocaine and marijuana, the return of a general guilty verdict does not authorize imposition of an enhanced sentence. And in *United States* v. *Harrell*, 737 F.2d 971, 981-982 (11th Cir. 1984), the court took a third course, holding in similar circumstances that "the imposition of [an enhanced] sentence does not amount to clear and prejudicial error," so that reduction of the defendant's sentence is inappropriate when the defendant fails to complain about the form of the indictment or request a special verdict at trial. Despite petitioner's suggestion to the contrary (Pet. 10-12), then, it would be premature for this Court to address the relationship of *Alvarez* to the Tenth Circuit's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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decision in this case. The Eleventh Circuit decided *Simmons*, *Alvarez* and *Harrell* virtually contemporaneously with each other; none of the decisions cites or discusses the others. It therefore would be appropriate for this Court to allow the Eleventh Circuit to reconcile the apparent tension between those decisions, and to adopt a settled rule on when enhanced penalties may be awarded under Section 841(b), before itself addressing the issue.

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